IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.PADMANABHAN NAIR

MONDAY, THE 22ND OCTOBER 2007 / 30TH ASWINA 1929

AS.No. 352 of 1994()

OS.289/1988 of ADDL.SUB COURT,IRINJALAKUDA
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APPELLANT:

VARGHESE, S/o. MALIYEKKAL OLLUKKARAN JOSEPH,
CHENGALOOR DESOM AND VILLAGE,
MUKUNDAPURAM TALUK.

BY ADV. SRI.K.G.BALASUBRAMANIAN

RESPONDENT:

MATHEW THARAKAN, S/o. PARAYIL VARKY,
AROOR DESOM AND VILLAGE,
CHERTHALA TALUK.

BY ADV. SRI.N.N.SUGUNAPALAN (SR.)

THIS APPEAL SUITS HAVING BEEN FINALLY HEARD ON 22/10/2007, THE COURT ON THE SAME DAYDELIVERED THE FOLLOWING:

K.PADMANABHAN NAIR,J

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A.S.No.352 of 1994

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Dated this the 22nd day of October, 2007

JUDGMENT

Plaintiff in O.S.289/1988 on the file of Additional Subordinate Judge, Irinjalakuda is the appellant. The appeal is filed against the decree and judgment passed by the court below dismissing a suit filed by the appellant for money. The plaintiff filed the suit for realisation of an amount of Rs.51,730/- on the following averments.

2. The defendant borrowed an amount of Rs. 38,000/- from a money lending firm named Angel Finance, Chalakkudy on 31.8.1985 and executed a pronote in favour of the finance company. The pronote was endorsed in favour of plaintiff on 21.10.1986. After getting the pronote endorsed appellant issued a notice demanding the repayment of the amount covered by the pronote. The defendant did not pay the amount but sent reply notice contending that he was not liable to pay the amount covered by the pronote. Hence the suit.

3. The respondent filed a written statement raising the following contentions. The suit was not maintainable. The firm Angel Finance, Chalakkudy was not in existence ever since December 1985. The respondent borrowed an amount of Rs.28,000/- from the Angel Finance, Chalakkudy on 31.3.1985 agreeing to pay interest at the rate of 12%. For the said loan two partially printed blank papers signed by the defendant were taken by the Angel Finance. The respondent paid the entire amount on 31.8.1985, and demanded return of the two partially printed blank signed papers entrusted with the financier. At that time Jose Thottan who was the proprietor of the Angel Finance had returned only one paper to the respondent. The other printed form was not returned stating that the same could not be traced out. The averment that the respondent borrowed an amount of Rs.38,000/- on 31.8.1985 was denied. It was contended that the firm was not in existence on that date. The appellant with ulterior motives obtained the partially printed blank paper endorsed by three persons who were not competent to represent the Angel Finance. The appellant is not a bonafide

endorser. Appellant did not pay any amount of consideration as alleged. The execution of the promissory note and receipt of Rs.38,000/- was denied.

4. The trial court after evidence found that Ext.A1 pronote was executed by the defendant. But it further found that there was nothing on record to show that plaintiff paid any consideration for getting Ext.A1 pronote endorsed in his name. It was also held that the competency of the persons who endorsed in Ext.A1 was not established. The suit was dismissed. Challenging the decree and judgment the plaintiff has filed this appeal.

5. The learned counsel appearing for the appellant has argued that the finding of the court below that appellant is not a holder in due course is illegal. It is argued that there was evidence to show that on 31.8.1985 the respondent executed Ext.A1 pronote after receiving Rs.38,000/-. It is also argued that in the reply notice the respondent had admitted the transactions but in the written statement he raised contention that he did not execute pronote. It is argued that at the time of evidence the

respondent developed third version that the endorsement was not supported by consideration. It is argued that such contention was raised without any factual foundation at all.

6. The case of the appellant was that the respondent borrowed an amount of Rs.38,000/- from Angel Finance, a firm which was engaged in money lending business and executed Ext.A1 pronote. In fact, that contention itself was denied by the respondent. The further cases of the appellant was that on 21.12.1986 he paid the entire amount due under Ext.A1 pronote to the Angel Finance and the firm endorsed the pronote in his favour. Ext.A4 is the details of the firm. The evidence on record shows that Jose Thottan, the Managing partner of the firm, died on 8.9.1986. The trial court relying on Ext.A4 held that firm was a partnership at will and in view of the provisions contained in Section 42 of the Partnership Act the firm Angel Finance stands dissolved on account of death of Jose Thottan as on 8.6.1986. It was also found that even after the death of Jose Thottan he was shown as a partner of the firm.

7. The case of the appellant was that on 28.9.1986, he had paid entire amount covered by Ext.A5 to the firm and there was endorsement. In Ext.A1 it was stated that the appellant paid the amount due to the firm and the firm endorsed pronote in his favour. The appellant gave evidence as PW1. A reading of his evidence shows that he had no consistent case. At one stage PW1 had deposed that he had advanced various amounts and as on October, 1986 an amount of Rs.40,000/- was due to him from the firm. But subsequently he deposed that on the date of execution he paid the entire amount due under Ext.A1 to the firm and got the same endorsed in his favour. The evidence on record shows that one of the partners was closely related to PW1. Going by the case of the plaintiff that the firm endorsed the pronote after dissolution. The competency of the persons who endorsed the pronote was also not established. PW2 had admitted that there was nothing on record to prove that he was the managing partner of the firm. He also admitted that there is no material to prove that P.V. Thomas, was the chairman. So the findings of the court below that the appellant failed to establish

the consideration and also the competency of the person who endorsed pronote as correct and do not call for interference.

8. Section 9 of the Negotiable Instruments Act defines holder in due course which reads as follows:

> "Holder in due course" means any person who for consideration became the possessor of a promissory note, bill of exchange or cheque if payable to bearer, or the payee or indorsee thereof, if [payable to order], before the amount mentioned in it became payable, and without having sufficient cause to believe that any defect existed in the title of the person from whom he derived his title."

9. Learned counsel appearing for the appellant relying on **Thambusami Reddiar v. Chidambaram Pillai (1954 MLJ (322))** has argued that the fact that actual amount of consideration paid under the endorsement is less than the amount stated in the promissory note is not a ground to hold that the endorsement is not supported by consideration. The appellant had no case that he paid only a lesser amount as consideration. On the other hand his case is that he paid

something more than the amount stated in the pronote. In **Ponnappa Moothan Sons v. Catholic Syrian Bank (1990(2) KLT 662)** the Apex Court has held as follows:

> " To be a 'holder in due course' a person must be a holder for consideration and the instrument must have been transferred to him before it becomes overdue and he must be a transferee in good faith and another important condition is that the transferee namely the person who for consideration became the possessor of the cheque should not have any reason to believe that there was any defect in the title of the transferor. The Indian definition imposes a more stringent condition on the holder in due course than the English definition. Under the Indian Law, a holder, to be a holder in due course, must not only have acquired the bill, note or cheque for valid consideration but should have acquired the cheque without having sufficient cause to believe that any defect existed in the title of the person from whom he derived his title. He should act in good faith and with reasonable caution. However, mere failure to prove bona fide or absence of negligence on his part would not negative his claim."

10. After elaborately considering the evidence on record the learned Subordinate Judge found that the appellant failed to prove that the persons who endorsed Ext.A1 were competent to endorse the same. It also found that appellant failed to prove that the endorsement was supported by any consideration. Those are findings of facts based on good evidence. Hence, I do not find any reason to take a view different from the view taken by the learned Subordinate Judge. Therefore the appeal is only to be dismissed.

In the result the appeal is dismissed.

K.PADMANABHAN NAIR, JUDGE

dvs